Supreme Court, U.S.
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No. 05-

In the Supreme Court of the United States

CINGULAR WIRELESS LLC,

Petitioner,

v.

JAIME WING,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Five

PETITION FOR A WRIT OF CERTIORARI

DONALD M. FALK
Mayer, Brown, Rowe & Maw LLP
Two Palo Alto Square
Suite 300
Palo Alto, CA 94306
(650) 331-2030

KENNETH S. GELLER
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

This petition presents the same questions that are presented in *Cingular Wireless LLC v. Mendoza*, No. 05-1119. They are:

1. Whether the Federal Arbitration Act preempts a state-law rule conditioning the enforcement of an arbitration provision on the defendant's amenability to class arbitration.

2. Whether the Federal Arbitration Act preempts a state-law rule that claims seeking injunctions on behalf of the general public are non-arbitrable.

CORPORATE DISCLOSURE STATEMENT

Petitioner Cingular Wireless LLC has no parent company. It is indirectly owned by AT&T Inc. (the result of the acquisition of AT&T Corp. by SBC Communications, Inc.) and BellSouth Corporation, which are the only publicly held corporations with a 10% or more ownership interest in Cingular Wireless LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cingular Wireless LLC respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California.

OPINIONS BELOW

The Court of Appeal's opinion after transfer (App., *infra*, 1a-12a) is unreported. The order of the California Supreme Court denying review (App., *infra*, 13a) is unreported. The order of the Superior Court denying Cingular's motion to compel arbitration (App., *infra*, 14a-16a) is unreported. The original decision of the Court of Appeal reversing the Superior Court's order (App., *infra*, 17a-31a) is unreported. The order of the California Supreme Court granting review of the Court of Appeal's original decision and instructing the Court of Appeal to reconsider its decision (App., *infra*, 32a) is unreported.

JURISDICTION

The judgment of the Court of Appeal was entered on October 3, 2005. The California Supreme Court denied Cingular's timely filed petition for review on December 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Although the Court of Appeal's judgment affirming the denial of Cingular's motion to compel arbitration is interlocutory, this Court has jurisdiction to review such judgments. See, *e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987); see also *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (granting certiorari and reversing interlocutory ruling refusing to enforce arbitration provision without addressing jurisdiction); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (same); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (same).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 (the Supremacy Clause) of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

STATEMENT

Cingular Wireless LLC is the nation's largest wireless service provider, with over 50 million customers, several million of whom are California residents. When Cingular's customers obtain wireless service, they enter into standard wireless service agreements that contain arbitration provisions.

Notwithstanding her obligation to arbitrate disputes, respondent Jaime Wing and two co-plaintiffs filed a lawsuit raising claims under California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §§ 17200 *et seq.*) and false advertising law (*id.* §§ 17500 *et seq.*) as well as common-law claims against Cingular, AT&T Wireless, and another wire-

less serv[illegible] provider. App., *infra*, 17a-18a.[1] Wing challenges C[illegible]lar's "Regulatory Cost Recovery Fee," which "included a fee for local number portability." *Id.* at 18a. Cingular moved to compel arbitration based on Wing's arbitration agreement. *Id.* at 20a.

The superior court denied the motion, holding both that Cingular did not prove the existence of Wing's arbitration agreement and that the alleged agreement was unconscionable because it prohibited class arbitration. App., *infra*, 15a-16a.

The Court of Appeal reversed, holding that Cingular had met its burden of proving the existence of an arbitration agreement and that the prohibition of class arbitration was not unconscionable. App., *infra*, 21a-31a. The court noted, however, that Wing's claims for public injunctive relief are non-arbitrable under *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (Cal. 1999) and *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003), which held that public injunctive claims under, respectively, the UCL and false advertising law and the California Consumer Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*) cannot be arbitrated. App., *infra*, 30a n.9. See also 05-1119 Pet. at 4-5.

Cingular petitioned for review to request that the California Supreme Court reconsider its opinions in *Broughton* and *Cruz*. Though Wing did not petition for review, the California Supreme Court granted review and transferred the case back to the Court of Appeal with instructions to vacate its opinion and reconsider in light of *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). App., *infra*, 32a.

In *Discover Bank*, the California Supreme Court held that class-action waivers are substantively unconscionable "when

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[1] Wing's co-plaintiff, William Bucy, made claims against AT&T Wireless. App., *infra*, 17a. We are concurrently filing a separate protective petition for certiorari in *New Cingular Wireless Services, Inc. f/k/a AT&T Wireless Services, Inc. v. Bucy*, No. 05-___.

the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. As set forth more fully in our petition for certiorari in *Mendoza*, the court also rejected several arguments raised by Discover Bank and its amici that the FAA preempted its unconscionability holding. See 05-1119 Pet. at 5-6.

After receiving supplemental briefs, the Court of Appeal filed a new opinion on October 3, 2005. Over Cingular's preemption arguments, the court then proceeded to hold that, under *Discover Bank*, the prohibition against class arbitration in Cingular's arbitration provision is substantively unconscionable because (i) it is found in a contract of adhesion, (ii) respondent's claims are small, and (iii) respondent alleges that Cingular engaged in unlawful practices. App., *infra*, 7a-12a.

Cingular filed a petition for review in the California Supreme Court arguing that (i) the Court of Appeal had misconstrued *Discover Bank*; (ii) the FAA preempts the Court of Appeal's holding that Cingular's prohibition against class arbitration is unconscionable; and (iii) *Broughton* and *Cruz* cannot be squared with this Court's precedents and should be overruled. The California Supreme Court denied review on December 14, 2005, without comment. App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

The issues presented in this case are identical to the ones presented in *Cingular Wireless LLC v. Mendoza*, No. 05-1119. First, the petition raises the question left open by this Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984): whether the FAA preempts a state-law rule conditioning the enforcement of an arbitration provision on the defendant's amenability to class arbitration. Second, the petition presents

the question whether the FAA preempts a state-law rule that claims for injunctions that would benefit the general public are non-arbitrable.

Both of these questions were answered in the negative by the courts of California. Together, these two holdings threaten to be the death knell for tens of millions of arbitration agreements in California.

In our petition for a writ of certiorari in *Mendoza*, we submit that (1) there is a conflict between the courts of California and other state and federal courts on each of the questions presented; (2) the issues presented are of great importance and warrant this Court's review; and (3) the California courts are on the wrong side of each issue.[2] Those arguments apply with equal force here.

Because the issues presented in this case are the same as those presented in *Mendoza*, the outcome of *Mendoza* should determine the outcome here. Accordingly, it would be appropriate for the Court to hold this case pending the disposition of the petition for a writ of certiorari in *Mendoza*.

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[2] We are supplying respondent's counsel with a copy of our petition in *Mendoza*.

CONCLUSION

The petition for a writ of certiorari should be held for disposition in light of *Cingular Wireless LLC v. Mendoza*, No. 05-1119.

Respectfully submitted.

DONALD M. FALK
Mayer, Brown, Rowe & Maw LLP
Two Palo Alto Square
Suite 300
Palo Alto, CA 94306
(650) 331-2030

KENNETH S. GELLER
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

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APPENDIX